IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 18, 2007 Session

STATE OF TENNESSEE v. DAVID DWAYNE SMITH

Direct Appeal from the Criminal Court for Cumberland County
No. 8358B Leon C. Burns, Jr., Judge

No. E2007-00084-CCA-R3-CD - Filed February 2, 2009

Following a jury trial, Defendant, David Dwayne Smith, was found guilty of first degree premeditated murder and conspiracy to commit first degree premeditated murder. Defendant was sentenced to life imprisonment with the possibility of parole for his murder conviction and a concurrent sentence of twenty years for his conspiracy conviction. On appeal, Defendant argues that (1) the evidence is insufficient to support his convictions; (2) the testimony of Defendant's accomplices was insufficiently corroborated; (3) the prosecutor engaged in prosecutorial misconduct during trial and during closing argument; (4) the State failed to fully disclose the terms of Hunter Oakes' negotiated plea agreement with the State; (5) the trial court erred in ruling inadmissible, testimony concerning the victim's and Lesa Regan's out-of-court statements; (6) the trial court's exclusion of these statements violated his constitutional right to present a defense; (7) the trial court erred in not allowing Defendant to introduce a video tape of the reconstruction of the offense; (8) the trial court erred in allowing the introduction of Defendant's verbal and nonverbal out-of-court statements; (9) the trial court erred in denying Defendant's request for a continuance; (10) the trial court erred in failing to require the State to make an election of offenses; and (11) there was a fatal variance between the bill of particulars and the proof presented at trial. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, and J. C. MCLIN, JJ., joined.

C. Douglas Fields, Crossville, Tennessee, for the appellant, David Dwayne Smith.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Randy York, District Attorney General; Gary McKenzie, Assistant District Attorney General; and Doug Crawford, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Procedural Background

Defendant was indicted for the first degree premeditated murder of the victim, Donald Elbert Stone, and conspiracy to commit first degree murder, along with co-defendants Noel Anthony Underwood, Ellison Watson, and Mitchell Hunter Oakes. The State entered a nolle prosequi as to the charges against Mr. Watson prior to trial. Also prior to trial, Mr. Underwood entered into a negotiated plea agreement with the State whereby Mr. Underwood agreed to enter a plea of guilty to a lesser included offense in exchange for his testimony at trial. The State proceeded to trial with Defendant and co-defendant Oakes. At the conclusion of the second day of trial, Mr. Oakes entered into a negotiated plea agreement with the State wherein Mr. Oakes agreed to enter a plea of guilty to the lesser included offense of solicitation of second degree murder, a Class C felony, with sentencing to be determined by the trial court. In exchange, Mr. Oakes agreed to testify at trial. The trial court granted the State's motion to sever co-defendant Oakes from the trial of Defendant.

II. Evidence Presented at Trial

The victim in this case was Donald Elbert Stone. Juanita Kay Stone, the victim's cousin, testified that the victim and Lesa Reagan, the victim's girlfriend, lived together and had five children. The victim visited Ms. Stone on Sunday, July 18, 2004, for approximately one hour and left between 8:15 p.m. and 8:30 p.m. Ms. Stone learned of the victim's death on Monday, July 19, 2004.

On cross-examination, Ms. Stone stated that Ms. Reagan had left the victim's home with the children about one month before the murder. Ms. Stone acknowledged that the victim had been drinking on the evening of July 18, 2004, and that he drank approximately six beers while he was at Ms. Stone's house.

Ms. Stone said that she and the victim were friends as well as cousins, and Ms. Stone often discussed the victim's problems with him. Ms. Stone said that the victim was very upset and appeared scared on July 18, 2004, and the two discussed various threats which the victim said had been made on his life. The victim and Ms. Stone also discussed various strategies for his gaining custody of the children, and the victim said that he wanted DNA testing to be performed on two of the children in order to verify paternity. The victim also wanted to meet with the Department of Children's Services on Tuesday, July 20, 2004, to arrange for some of his children to undergo drug testing. Ms. Stone and the victim discussed a recent meeting between the Defendant and the victim. Ms. Stone said the victim considered Defendant to be a friend, and she acknowledged that the victim appreciated Defendant's interest in the victim's children.

On redirect examination, Ms. Stone stated that she was aware that Defendant and the victim had argued over various issues in the past, but acknowledged on re-cross-examination that she was not aware of any physical disputes between the two men.

Lori Hyett testified that she knew both Defendant and the victim, and she often visited the victim and Ms. Reagan in their home. Ms. Hyett stated that Defendant and Mr. Oakes were usually present during her visits. Ms. Hyett said that during these gatherings, Ms. Reagan and Mr. Oakes would often go into the kitchen to talk. Ms. Reagan flirted with Mr. Oakes and rubbed against him provocatively. Ms. Hyett described one situation in which Ms. Reagan exposed her breasts to Mr. Oakes in the victim's presence.

On June 15, 2004, Ms. Reagan drove Ms. Hyett and her husband, Carl, home from a gathering at the victim's home. After they dropped Mr. Hyett off, Ms. Reagan asked Ms. Hyett to go with her to get some drugs. Ms. Hyett said that Ms. Reagan drove to Atkins Cemetery where Mr. Oakes was waiting. Ms. Reagan and Ms. Hyett got into Mr. Oakes' truck and drove to his house. Defendant was also at Mr. Oakes' house. Ms. Hyett said that she went to sleep on a couch, and Defendant slept on another couch. The next morning Ms. Hyett woke up and went to find Ms. Reagan because she wanted to go home. Ms. Hyett knocked on Mr. Oakes' bedroom door, opened it, and found Ms. Reagan in Mr. Oakes' bed.

Shortly thereafter, Ms. Hyett visited Mr. Oakes at his home. Ms. Hyett said that Mr. Oakes told her that it was not right for the victim to hit Ms. Reagan in front of the children. Mr. Oakes believed that he was going to have problems with the victim, and Mr. Oakes said that he did not appreciate the victim driving his vehicle through his gate. Mr. Oakes told Ms. Hyett that he would shoot the victim before the victim shot him. Ms. Hyett acknowledged that she had never seen the victim abuse Ms. Reagan.

Ms. Hyett drove by the victim's house on Saturday, July 17, 2004, and stopped to ask the victim if he wanted her to buy him some beer. The victim and Defendant were on the front porch engaged "in a pretty heated discussion." Defendant stood up and told Ms. Hyett to leave. Ms. Hyett looked at the victim and he also told her to leave, she drove away. Ms. Hyett went to the victim's home on Monday, July 19, 2004, with her husband. The victim did not answer their knock at the door. Mr. Hyett looked into the front window and told Ms. Hyett that the victim had been shot. They called 911.

Ms. Hyett acknowledged that she had a prior conviction for accessory after the fact for murder. Ms. Hyett said that the charge resulted from her failure to tell the T.B.I. that her former husband had committed murder and that she had driven the couple's vehicle while her former husband disposed of the murder weapon.

On cross-examination, Ms. Hyett said that she moved into a house across from the victim's residence in April 2003 before she went to prison in July 2003 on the accessory conviction. Ms. Hyett stated that she was released from prison in December 2003. Ms. Hyett acknowledged that Ms. Reagan exposed herself to men other than Mr. Oakes, particularly a man Ms. Hyett knew only as "Toby." Ms. Hyett said that Toby moved into the victim's house with Ms. Reagan four days after the victim's funeral, and that he and Ms. Reagan were now married. Ms. Hyett said that Ms. Reagan and Mr. Oakes were fully clothed when she discovered them in Mr. Oakes' bed on the morning of

June 16, 2004. Ms. Hyett acknowledged that she had never seen Ms. Reagan kiss Mr. Oakes, or witnessed Mr. Oakes making sexual overtures to Ms. Reagan. Ms. Hyett said that Ms. Reagan had never expressed any interest in Defendant. Ms. Hyett said that she saw Defendant after the shooting, and Defendant did not show any animosity toward the victim.

Noel Anthony Underwood testified that he had known Mr. Oakes about six years and had known Defendant all his life. Mr. Underwood had never met the victim. Mr. Underwood said that at the time of the shooting, he lived in a camper on land belonging to Jeffery Ladd. Mr. Underwood described the sequence of events leading up to the shooting as follows.

In July 2004, approximately three to four weeks before the victim's murder, Mr. Oakes called Mr. Underwood and asked him to give Ms. Reagan and her children a place to stay. Mr. Underwood did not know Ms. Reagan, but he let her stay in his camper while he moved into Mr. Ladd's residence. Mr. Oakes visited Ms. Reagan frequently during this time.

Approximately two weeks before the victim's murder, Mr. Oakes told Mr. Underwood that the victim had threatened him, and Mr. Oakes wanted to frighten the victim. Mr. Oakes drove an older model gray or silver Cadillac to the victim's home. Defendant sat in the front passenger seat, Ellison Watson sat behind Mr. Oakes, and Mr. Underwood sat behind Defendant. A lamp was on in the victim's living room as Mr. Oakes drove past the house. Mr. Oakes turned the vehicle around in a parking lot. As they approached the victim's house again, someone handed Mr. Underwood an SKS rifle. Mr. Underwood aimed over the victim's house and discharged the rifle. One of the bullets struck the Cadillac's rear window, but Mr. Underwood did not believe that any bullets struck the victim's house. Mr. Underwood acknowledged that all of the men had been drinking that night.

On Sunday, July 18, 2004, Mr. Underwood, Mr. Oakes, and Defendant spray painted the Cadillac black at Mr. Ladd's residence. Lynn Watson drove up and talked to the three men for a few minutes. Later that evening, Mr. Oakes and Mr. Underwood drove to Mr. Oakes' residence in the Cadillac while Defendant followed in his truck. Mr. Oakes checked his answering machine and noticed that the victim had left a message. Mr. Oakes and Defendant discussed "the situation" with the victim. Mr. Oakes said that he was going to try to call the victim and went into his bedroom. Mr. Underwood did not hear whether Mr. Oakes reached the victim. Mr. Oakes returned from the bedroom, and the three men sat around the kitchen table drinking Tequila while they again discussed the "situation." Mr. Underwood stated that the men had also been taking Xanax over a period of five to six days before the killing.

Mr. Underwood said that the men did not reach a decision about how to handle the victim, although Mr. Oakes suggested that they try to scare the victim again. Mr. Oakes went into his bedroom and returned with a nickle-plated pistol. Mr. Underwood suggested that Defendant take a shower. Defendant pulled a "do-rag" over his head and put on a pair of surgical gloves, a long-sleeved shirt, and work gloves over the surgical gloves. Defendant then duct taped the working gloves to the sleeves of his shirt.

The men left for the victim's house at approximately 9:00 p.m. Mr. Oakes drove the Cadillac with Mr. Underwood in the front passenger seat and Defendant in the backseat. Mr. Underwood described the next events as follows:

> We drive by [the victim's] house, and we go on up to the Cumberland Retreat and turn around to see if anybody is around. We start back by, and we pass the house, and at the foot of the hill there's a pull-off to the left. As we got toward the bottom of the hill, [Defendant] said, "Slow down." We slowed down, and [Defendant] said, "Let me out." He got out walked into the woods and started up the road. It looked like a power line to me. . . . [Defendant had] the .44 pistol. . . .

Mr. Oakes and Mr. Underwood drove around for approximately twenty minutes before they returned to the pull-off. Defendant got in the car and said, "It's done, it's taken care of."

The three men drove back to Mr. Oakes' residence. Mr. Underwood said they were "unnerved." Defendant opened the gun's cylinder and showed Mr. Underwood that there was one spent round in the chamber. Mr. Oakes gathered up the ammunition for the SKS rifle and the .44 magnum revolver and put it into a milk jug. Defendant gave Mr. Underwood the casing from the spent round in the .44 revolver. The three men decided to establish an alibi and drove to a store in Pikeville to buy beer and cigarettes. They then drove to Mr. Ladd's residence. Ms. Reagan left with Mr. Oakes in Mr. Oakes' vehicle, and both of them returned to Mr. Ladd's house at dawn.

The next morning, Mr. Underwood said that Defendant removed the gas tank from the Cadillac because he intended to take the vehicle to the junkyard to be crushed. Defendant, Mr. Oakes, and Mr. Underwood decided to work for awhile that morning, cutting down trees in town. They loaded the truck with their tools and the milk jug containing the ammunition. On the way, they passed a lake, and Mr. Oakes threw the milk jug into the water. Defendant fired shots at the milk jug when it did not sink. On the way home, they passed a dump site and threw out the spray paint cans and the gas tank from the Cadillac. Mr. Underwood gave the spent .44 caliber hull to Defendant, and then he and Defendant hid the murder weapon in the woods behind Mr. Ladd's residence. Later, Mr. Underwood grew uneasy that he would be blamed for the murder because he knew where the gun was buried. Mr. Underwood dug up the gun and gave it to Chris Garwood who said that he would dispose of it.

Mr. Underwood acknowledged that he initially lied to the investigating officers about his knowledge of the circumstances surrounding the murder. Mr. Underwood stated that he agreed to cooperate with the T.B.I. after he was charged with the victim's murder. Mr. Underwood escorted Agent Tommy Callahan to the various locations in which the milk jug, gas tank, and spray paint cans had been discarded.

On cross-examination, Mr. Underwood said that he did not know if the victim was home on the night of the drive-by shooting. Mr. Underwood denied that Donnie Stone, Jr., the victim's son, was in the car during the incident. Mr. Underwood stated that when they returned to Mr. Oakes'

house after the killing, the three men made a pact that if anyone revealed what had happened that night, "they would be next."

Mr. Underwood said that he did not hear Defendant and Mr. Oakes discuss killing the victim, and as far as he knew, Defendant and Mr. Oakes did not have a plan to kill the victim. Mr. Underwood said that he was shocked when he learned of the victim's death. Mr. Underwood said that after the gasoline tank was removed from the Cadillac, Defendant knocked a hole in the tank to let the gasoline out. Mr. Underwood stated that Defendant's "do-rag" and gloves, as well as the duct tape, were placed in the Cadillac before it was sold to the junkyard for scrap. Mr. Underwood said that he fired the murder weapon one time after it was hidden in the woods.

Scott Griffin, an investigator with the Cumberland County Sheriff's Department, arrived at the victim's house on Monday, July 19, 2004, at approximately 9:00 p.m. The victim was discovered in a prone position on the couch with his ankles crossed, and with an injury to his head. A .38 Smith & Wesson revolver was on the floor between the coffee table and the couch.

Investigator Griffin later accompanied Agent Callahan during Mr. Underwood's tour of the various locations where Mr. Underwood had disposed of evidence pertaining to the crime. Investigator Griffin stated that the officers recovered a milk jug, with what appeared to be bullet holes, from a lake in Van Buren County. The milk jug was stamped with the notation, "sell by July 23." A spray paint can was found in the back of a pick-up truck which was parked behind an RV camper in Mr. Ladd's back yard. Investigator Griffin said that the gas tank recovered from the dump site had a hole in the top of the tank next to where the fuel pump would ordinarily be located.

On cross-examination, Investigator Griffin said that the victim's head was resting on a pillow, and the pillow was transported with the victim to the medical examiner's office. The medical examiner's office later recovered a bullet from the pillow. Investigator Griffin stated that the milk jug recovered from the lake contained .44 caliber bullets, and spent and unspent casings. Investigator Griffin could not remember whether there were bullets of a different caliber in the milk jug.

Brenda Watson, Ellison Watson's wife, testified that Defendant, who was her nephew, came to her house on one occasion with Mr. Oakes and Ms. Reagan. Ms. Watson said that Ms. Reagan was flirting with Mr. Oakes, but Mr. Oakes did not respond to her overtures. On cross-examination, Ms. Watson said that Mr. Watson left their house on Sunday, July 18, 2004, and someone brought him home that night between 9:30 and 10:00 p.m.

Robert Lynn Watson, Defendant's uncle, testified that he had seen Mr. Oakes and Ms. Reagan together on various occasions, and he acknowledged that he had seen the couple hug and kiss. Mr. Watson acknowledged that he sold a 1978 gray Cadillac to Mr. Oakes. Mr. Watson said that Mr. Underwood told him that Mr. Oakes and Defendant sold the Cadillac for scrap metal on Tuesday, July 21, 2004. Mr. Watson initially denied that he had seen anyone paint the Cadillac black, but said that he had heard that Mr. Oakes and Defendant painted the vehicle because it was

scratched after being run into a ditch. Subsequently, Mr. Watson clarified his earlier testimony and said that it "could be" that he saw Defendant, Mr. Oakes, and Mr. Underwood painting the Cadillac black at Mr. Ladd's residence on Sunday, July 18, 2004.

On cross-examination, Mr. Watson said that it "very well could have been" that the car was painted on Saturday, July 17, 2004. Mr. Watson stated that he did not know when the Cadillac was driven into a ditch. Mr. Watson said that a couple of months before the murder, Mr. Oakes came over to his house and retrieved his trailer which Mr. Oakes used to transport scrapped cars. Mr. Watson insisted that Defendant did not give him any money for the Cadillac. Mr. Watson did not know if Mr. Oakes loaned Defendant the money to purchase the Cadillac.

Donnie Stone, Jr., the victim's son, testified that he knew Mr. Oakes and Defendant because the two men used to come to his house to visit the victim. Mr. Stone stated that after Ms. Reagan left the victim in the middle of June 2004, the family stayed at various places, including Mr. Oakes' residence. Mr. Stone stated that about a week before the murder he accompanied Defendant, Mr. Oakes, and Mr. Ellison Watson for a ride in Defendant's Cadillac. The group stopped by Defendant's house and retrieved some guns. Defendant carried a 9 mm gun, and Mr. Oakes was armed with a .44 magnum revolver. They drove slowly by the victim's house, and Defendant and Mr. Oakes pulled out their weapons. Mr. Oakes said "It's too dark out here, we can't see. Let's go." Mr. Stone said that he was glad that his father was not home. Mr. Stone said that Mr. Oakes showed him the .44 magnum revolver on one occasion, and Mr. Oakes taught Ms. Reagan how to fire the weapon. Mr. Stone said that he did not tell anyone about the aborted drive-by shooting because he was not allowed to use the telephone.

Mr. Stone said he was living with Mr. Ellison Watson at the time of the offense. Mr. Stone said that Mr. Oakes picked up Mr. Watson on Sunday, July 18, 2004, at approximately 2:00 p.m., and Defendant brought Mr. Watson home around 10:00 p.m. that night. Mr. Stone said that he planned to accompany Ms. Reagan to court on Tuesday, July 20, 2004. Mr. Oakes and Defendant picked him up at Mr. Watson's house on that date and met Ms. Reagan at Atkins Cemetery. Ms. Reagan told Mr. Oakes that she need to stop by the victim's house to change clothes before going to the courthouse, and Mr. Oakes told her not to do that.

On cross-examination, Mr. Stone acknowledged that he told Agent Callahan that Mr. Oakes picked up Mr. Watson on Sunday, July 18, 2004, and Defendant brought him home that night at approximately 10:00 p.m. Mr. Stone stated that his mother left the victim because the victim had held a gun to her head and accused her of having an affair with Mr. Oakes. Mr. Stone acknowledged that Mr. Oakes was concerned for the children's safety after they left the victim's house.

Tracy Treadway testified that he was the head weigh master at PSC Metals' scrap metal facility in Harriman. Mr. Treadway identified a scale ticket dated July 20, 2004, reflecting the sale of "whole cars," which was signed by "David Smith." The scrap material weighed 3,860 pounds and the sales price was $144.75. Mr. Treadway said that it was company policy for the seller to remove the gas tank, battery, and tires from the vehicle before it was sold. On cross-examination, Mr.

Treadway acknowledged that two cars could have been brought in that day, but he did not have a present recollection of the event. Mr. Treadway explained that an average vehicle weighs between 2,400 and 2,800 pounds, and that older vehicles tended to be heavier. Mr. Treadway did not know what a 1978 Cadillac weighed.

Robert White, the owner of a local automotive parts supply company, found a replacement gas tank suitable for a 1978 Cadillac Deville at the State's request. Mr. White testified that he compared the replacement tank with the gas tank recovered during the investigation of the victim's murder and found it to be an identical match. Mr. White explained that the replacement gas tank would only fit a 1978/1979 Cadillac Deville or an 1988/1989 Cadillac Fleetwood.

Jackie Rogers testified that he was the manager of Benton Shooter Supply in Polk County. On December 24, 1999, Mr. Rogers sold a Smith & Wesson, model 629, .44 magnum revolver to Bobby Noel Bowman. The serial number of the revolver, CDU3104, matched the serial number of the .44 magnum revolver introduced as an exhibit at trial.

Bobby Noel Bowman acknowledged that he bought the .44 magnum revolver from Benton Shooter Supply and testified that he sold the revolver to Mark Settles. Mr. Settles testified that Mr. Oakes had told him that he was looking for a .44 magnum revolver. Mr. Settles said that he bought the .44 magnum revolver from Mr. Bowman for Mr. Oakes and sold the gun to Mr. Oakes two or three weeks later. Mr. Settles said that he knew Defendant and that Defendant stayed in Mr. Oakes' house while Mr. Oakes was working out of town. On cross-examination, Mr. Settles stated that Mr. Oakes was a hard worker, and that he had never known Mr. Oakes to be in trouble before.

Agent Callahan testified that on September 22, 2004, he recovered the .44 magnum revolver, wrapped in duct tape and two plastic bags. The revolver was sent to the T.B.I. crime laboratory for testing. Agent Callahan recovered the milk jug on April 4 or April 5, 2005, and the contents of the milk jug were also sent to the crime laboratory for testing.

Agent Callahan said that the gun was recovered before Mr. Underwood, Mr. Oakes and Defendant were indicted, and only the investigating officers knew about its discovery. Agent Callahan said that an attorney in Sparta had contacted the district attorney's office and said that her client, Warren King, might know the location of the murder weapon.

Agent Callahan interviewed Mr. Oakes on July 20, 2004, and Mr. Oakes told him that he had taken a car that morning to the junk yard for crushing. Based on this information, Agent Callahan secured the scale receipt a few days later.

Agent Callahan said that Mr. Underwood expressed his desire to cooperate with the investigating officers shortly after he was indicted. Mr. Underwood gave a written statement and escorted Agent Callahan to various locations relevant to the commission of the offense in order to corroborate his statement.

Agent Callahan subpoenaed Mr. Oakes' home telephone records which were introduced as an exhibit at trial. According to the records, Mr. Oakes' home telephone called the victim's home telephone number on July 18, 2004, at 6:33 p.m., 10:50 p.m, 10:52 p.m., and 10:53 p.m. Telephone calls to the victim's cell phone number were placed at 10:56 p.m. and 10:57 p.m. Agent Callahan stated that the times of the telephone calls corroborated Mr. Underwood's time line of the offense.

On cross-examination, Agent Callahan acknowledged that Mr. Underwood's information about the telephone calls was not reflected in his written statement. Agent Callahan said that Mr. Underwood orally disclosed this information after his statement was given, and Agent Callahan did not make a written note of the conversation. Agent Callahan acknowledged that the numeral "3" was reflected on the victim's answering machine, but he did not recall whether he or someone else had listened to the voice mails.

Agent Callahan stated that Mr. King disclosed the location of the murder weapon in an effort to secure a more favorable settlement with the State on an unrelated charge, and that Mr. Garwood had given Mr. King the gun for that purpose. No fingerprints were found on the gun, and Agent Callahan did not submit the duct tape in which the gun was wrapped for DNA testing. Agent Callahan conceded that it was possible that Mr. Underwood threw the milk jug into the lake. The milk jug contained only .44 caliber ammunition and one .38 caliber bullet. Agent Callahan said that he also received information about the crushed car and the spray paint cans from sources other than Mr. Underwood, but he said that only Mr. Underwood knew about the milk jug. Agent Callahan said that he did not search Mr. Oakes' house, and he was not aware if Mr. Oakes owned any guns other than the .44 magnum revolver.

Dr. Tom Deering with the State Medical Examiner's office performed an autopsy on the victim and determined that the cause of death was a gunshot wound to the head. Dr. Deering testified that the bullet used in the shooting was recovered from a pillow that was transported with the victim to the medical examiner's office. On cross-examination, Dr. Deering stated that he performed a blood alcohol test on the victim, and the victim's ethanol level was 0.29. Testing did not reveal the presence of any drugs.

Shelly Betts, a special agent forensic scientist with the T.B.I., test fired eight cartridges from the Smith & Wesson, .44 caliber magnum revolver, serial no. CDU3104. Agent Betts testified that the bullet recovered from the victim's pillow was fired from that weapon. The ammunition discovered in the milk jug was also tested, and Agent Betts determined that the casings in the milk jug had been fired from the murder weapon.

Tonya Marie Mansel testified that she had met Defendant twice, but she did not know the victim. Ms. Mansel attended a gathering, which included Defendant, at Mr. Ladd's house shortly after the murder. Ms. Mansel asked if anyone had heard about the victim's murder. Ms. Mansel said that it appeared to her to be cold-blooded, and she had heard it was an execution-style killing. Defendant told her, "He didn't feel a damn thing." Ms. Mansel asked Defendant, "Damn, did you do it?" Defendant did not respond but "kind of grinned" in a "pretty cold" way. On cross-

examination, Ms. Mansel indicated that she assumed from Defendant's verbal and non-verbal responses to her comment and question that he had committed the murder, but she acknowledged that she did not immediately tell the police about the incident.

Mitchell Hunter Oakes testified that he and Ms. Reagan were just friends, and that he was not interested in developing a deeper relationship with her. Mr. Oakes said that the victim was angry that summer because Ms. Reagan had left his home with the children. After she left, Ms. Reagan and her children spent a few nights in their vehicle, so Mr. Oakes gave them a place to stay because he was concerned about the children. Mr. Oakes said that Defendant lived with him and took care of Mr. Oakes' property when he was working out of town. Mr. Oakes said that he loaned Defendant $100 to buy the gray Cadillac for parts.

Mr. Oakes explained that he and Defendant wanted to scare the victim because the victim had been physically abusing his children. Mr. Oakes said that Defendant would get very upset whenever the topic was mentioned. Mr. Oakes acknowledged that most of his information about the physical abuse came from Ms. Reagan, but he stated that he had seen bruises on the children. On Thursday, July 8, 2004, Mr. Ellison Watson drove him, Defendant, and Mr. Underwood to the victim's house. Mr. Underwood told Mr. Watson to slow down and then shot an AK 47 and a .44 magnum revolver at the victim's house.

Mr. Oakes said that the victim drove over some of his gates on the Saturday before the killing. Defendant told Mr. Oakes that he would talk to the victim about the incident. When he returned from the victim's home, Defendant told Mr. Oakes that "everything was all right, but that they did have a heated discussion."

Mr. Oakes said that on Sunday, July 18, 2004, a group of people, including Defendant, Mr. Ellison Watson, and Mr. Underwood, were at his house drinking and working on a dump truck. The group went to Mr. Ladd's house between 2:00 p.m. and 3:00 p.m. Mr. Oakes said that the Cadillac was parked on Mr. Ladd's property because Defendant and Mr. Watson had driven the Cadillac into a ditch, tearing up the front quarter of the passenger side. Mr. Oakes, Mr. Ladd, Ms. Reagan, Mr. Underwood, Mr. Lynn Watson and Defendant spray painted the Cadillac's hood and fenders black.

Between 8:00 p.m. and 8:30 p.m., Mr. Oakes, Mr. Underwood and Defendant returned to Mr. Oakes' house. Mr. Oakes and Mr. Underwood rode in Mr. Oakes' Dodge truck, and Defendant followed in the Cadillac. Defendant took a shower and changed clothes, and then Defendant and Mr. Underwood began to talk once more about scaring the victim. Mr. Oakes said that there "was no agreement of anything" other than to drive by the victim's house and see if he was at home. Mr. Oakes acknowledged that he called the victim's house before they left to see if he was home.

On the way to the victim's house, Mr. Oakes stated that Defendant said something to the effect that it was "time to take care of [the victim]." Mr. Oakes said that when Defendant got "hot-headed," Mr. Oakes thought it might be him "looking down the barrel of that .44 [revolver]."

Mr. Oakes dropped Defendant off at the pull-off, and Defendant headed up the hill, armed with the .44 magnum revolver. Mr. Oakes and Mr. Underwood drove around for awhile, and then returned to the pull-off. Mr. Oakes stated that Defendant got into the car and said, "It's been done." Mr. Oakes said that he had traded the revolver to Defendant in February 2004, in exchange for Defendant's work around his property.

The group drove back to Mr. Oakes' house, and Mr. Oakes got into his pickup. Mr. Oakes followed Defendant over to Defendant's house, and then they drove to a local store to buy beer. Eventually, they drove to Mr. Ladd's house. Mr. Oakes said that he returned to his house around 2:00 a.m. and discovered that the gas tank had been removed from the Cadillac. Mr. Oakes stated that he and Defendant wanted to get rid of the Cadillac, so they hauled it behind Mr. Oakes' Ford pick-up truck to the junk yard in Rockwood on July 20, 2004. Mr. Oakes said that he did not see the revolver again after Sunday. Defendant told Mr. Oakes that Mr. Underwood was taking care of disposing of the weapon. Mr. Oakes said that the milk jug contained only .44 caliber ammunition. At some point after the killing, Mr. Oakes stated that Defendant admitted to him that he had shot the victim, and that "he had saved the hull for a souvenir."

On cross-examination, Mr. Oakes acknowledged that his testimony did not agree with Mr. Underwood's testimony in certain respects. For example, Mr. Oakes said that Mr. Ellison Watson was driving, not him, on the night of the drive-by shooting. Mr. Oakes also stated that only the front part of the Cadillac was painted, and that Defendant was not present when the vehicle was painted. Mr. Oakes said that he did not see Defendant put on gloves before the group drove to the victim's house, nor did he see Defendant use any duct tape.

Mr. Oakes acknowledged that the victim did not answer his telephone on the night of July 18, 2004, but Mr. Oakes thought the victim might have passed out. Mr. Oakes said that Defendant talked to Ms. Reagan before they left Mr. Ladd's house on Sunday, and was angry as a result of their discussion. Mr. Oakes stated that the victim was angry with Defendant on one occasion because Defendant had disciplined the victim's son. Mr. Oakes said that there was no animosity between himself and the victim, and that the victim did not believe that Mr. Oakes was having an affair with Ms. Reagan.

At the close of the State's case-in-chief, Defendant offered proof in his defense. Steve Norris, a meteorologist, testified that there was a new moon on July 18, 2004, and that the moon set at 10:10 p.m.

Dustin Watson testified that Mr. Underwood asked him to drive Mr. Underwood to the cemetery. Mr. Wilson let Mr. Underwood out at the cemetery, and Mr. Underwood went into the woods. When he returned, Mr. Underwood was carrying a gun. Mr. Watson said that the gun was similar to that in the photograph of the .44 magnum revolver introduced as an exhibit at trial except that the gun in the photograph did not have handles. Mr. Watson stated that when they returned to Mr. Watson's house, Mr. Underwood fired the gun three or four times at a Mason jar.

Tia Myles testified that she lived across the street from the victim. Ms. Myles said that the sound of five or six gunshots from the direction of the victim's house woke her up between 1:00 a.m. and 2:00 a.m. on July 19, 2004.

Rick Berry testified that he was a private investigator and assisted defense counsel in the preparation for trial. Mr. Berry said that the pull-off on Lantana Road was four-tenths of a mile from the victim's house. Mr. Berry did not observe any power lines or other type of lines in the area which would provide a clearing through the underbrush. Mr. Berry said that he inspected the pull-off at night time, when there was no moon, and described the area as "pitch black." Mr. Berry stated that there was no lighting in the area other than the moon.

III. Corroboration of Accomplice Testimony

Relying on State v. Boxley, 76 S.W.3d 381 (Tenn. Crim. App. 2001), Defendant argues that the accomplices' testimony was insufficiently corroborated to support his convictions. Specifically, Defendant contends that no witness other than the accomplices could identify Defendant as a participant in the offenses.

"In Tennessee, a conviction may not be based solely upon the uncorroborated testimony of an accomplice." State v. Shaw, 37 S.W.3d 900, 903 (Tenn. 2001) (citing State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994)). Furthermore, accomplices cannot corroborate each other. State v. Green, 915 S.W.2d 827, 831 (Tenn. Crim. App. 1995).

Our supreme court has explained the quantum of proof necessary to establish sufficient corroboration as follows:

> [T]here must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's evidence.

Shaw, 37 S.W.3d at 903 (quoting Bigbee, 885 S.W.2d at 803).

"In other words, the corroboration must include some fact establishing the identity of the defendant as a criminal actor. It is generally for the jury to determine whether sufficient corroboration exists." Boxley, 76 S.W.3d at 386, 387 (citing Shaw, 37 S.W.3d at 903). However, as this Court has previously pointed out, "[e]vidence which merely casts a suspicion on the accused

... is inadequate to corroborate an accomplice's testimony." State v. Griffis, 964 S.W.2d 577, 589 (Tenn. Crim. App. 1997).

In Boxley, the defendant was convicted of first degree felony murder and attempted aggravated robbery. His two co-defendants agreed to enter pleas of guilty to lesser included offenses of the charged offenses in exchange for their testimony at trial. Both accomplices testified that the defendant participated in the attempted robbery which resulted in the victim's death. Boxley, 76 S.W.3d at 383-386.

The State argued that its witnesses "corroborated the time the crime occurred, the type of vehicle used, the manner in which the offense was committed, and the number and race of persons present." Id. at 387. This Court, however, observed that:

> [u]nfortunately, none of this evidence relates to the identity of the defendant. It is not enough to simply corroborate that a crime has been committed in a manner described by the accomplices. See Shaw, 37 S.W.3d at 903. The record is devoid of any independent evidence connecting the defendant to the two accomplices, the gray Cavalier, the crime scene or the surrounding area, the weapons, the masks, the skullcaps, or the clothing found or described by witnesses.

Id.

The State concedes that Mr. Underwood and Mr. Oakes, who were both indicted for the charged offenses, were accomplices as a matter of law but contends that their testimony was corroborated by; (1) Donnie Stone, Jr.'s testimony concerning the drive-by shooting which occurred prior to the offenses; (2) Mr. Treadway's testimony concerning the scale ticket dated July 20, 2004 and (3) Ms. Mansel's testimony concerning her encounter with Defendant after the killing.

Donnie Stone, Jr., corroborated the accomplices' testimony that Defendant participated in the drive-by shooting of the victim's house a few days before the killing, although his description of the incident varied from that of the accomplices. Mr. Stone's testimony, however, shed no light on the sequence of events on July 18, 2004, nor did his testimony in any way identify Defendant as a participant in the killing of the victim.

Mr. Treadway testified that according to the scale ticket, "whole cars" were brought to the junkyard for shredding on July 20, 2004, and the scale ticket was signed by "David Smith." Mr. Treadway had no present recollection of the transaction. Mr. Treadway could not identify the type of car or cars sold and did not ask for the seller's identification before the scale ticket was signed. Although this testimony corroborated the accomplices' testimony that the Cadillac they claimed was used in the commission of the crime was subsequently shredded, at most it only casts suspicion on Defendant based on conduct after the commission of the offenses and does not identify Defendant as a participant in the crime itself.

Ms. Mansel testified on direct examination that she attended a gathering at Mr. Ladd's home shortly after the victim's murder, and that Defendant was also present. The following colloquy occurred:

THE STATE:	And did you discuss [the murder] with [Defendant]?
MS. MANSEL:	Not directly to him. I was talking to the people in the room.
THE STATE:	Okay. And what was it that you said.
. . .	
MS. MANSEL:	I asked if they had heard about the murder across the mountain, and everything pretty much got kind of quiet in the room, and everybody kind of looked over at [Defendant]. And I was like, "You know, I thought that was kind of cold-blooded, you know. I heard it was execution style."
. . .	
THE STATE:	Okay. And what did [Defendant] say?
. . .	
MS. MANSEL:	That he didn't feel a damn thing.
THE STATE:	He said, "He didn't feel a damn thing," [Defendant] said in response to that question?
MS. MANSEL:	Yes, sir.
THE STATE:	"He didn't feel a damn thing." And what was your response to that?
MS. MANSEL:	"Damn, did you do it?"
THE STATE:	And what did [Defendant] do?
MS. MANSEL:	If I'm not mistaken, I believe it was Lynn Watson who said, "Drop it." He was getting a tattoo.

THE STATE:	But, no, that's . . .
DEFENSE COUNSEL:	Well, I object to the hearsay, Your Honor.
THE COURT:	Sustained.
THE STATE:	I'm not asking that. I'm not asking you that question. What I'm asking you . . .
MS. MANSEL:	He – he didn't respond, [Defendant] didn't respond. He kind of grinned and . . .
STATE:	What was the look on his face?
MS. MANSEL:	Kind of a grin, you know. Very – pretty cold.

On cross-examination, defense counsel continued this line of questioning.

DEFENSE COUNSEL:	You felt it was pretty cold, Ms. Mansel, but . . .
MS. MANSEL:	Yes, sir.
DEFENSE COUNSEL:	. . . isn't it true, that at that time, you didn't take it that he was telling you he had done anything?
MS. MANSEL:	Actually, that is what I assumed.

The sufficiency of the corroborating evidence presented by the State is a close issue. The corroborating evidence must "confirm in some manner that (a) a crime has been committed and (b) the accused committed the crime." Griffis, 964 S.W.2d at 589. As in Boxley, there was corroborating evidence of the accomplices' description of the manner and time of the killing, but none of the State's witnesses could identify Defendant as a participant in the offense other than Ms. Mansel's testimony concerning her conversation with Defendant shortly after the murder. Nonetheless, "only slight circumstances are required to corroborate an accomplice's testimony." Id.

A defendant's admission to a non-accomplice that he intended to or did kill the victim may be sufficient to corroborate the accomplice testimony that the victim was murdered and that the defendant participated in the killing. See State v. Steve Skinner, No. W2003-00887-CCA-R3-CD, 2005 WL 468322, at *12 (Tenn. Crim. App., at Jackson, Feb. 28, 2005), perm. to appeal denied (Tenn. June 27, 2005) (finding sufficient corroboration in a non-accomplice's testimony that he overheard the defendant make several statements after the commission of the crime including that "we killed [the victims] and "we whacked them"); State v. Edward Coleman and Sean Williams, No. W2001-01021, 2002 WL 31625009, at *4 (Tenn. Crim. App., at Jackson, Nov. 7, 2002), perm. to

appeal denied (Tenn. Mar. 3, 2003) (finding sufficient corroboration in a non-accomplice's testimony that both co-defendants had made statements to him that they intended to kill the victim, and that one of the co-defendants admitted to him after the crime that he shot the victim).

In this regard, a defendant's own statements are admissible at trial subject to exclusion only by other rules of evidence. Tenn. R. Evid. 803 (1.2); State v. Lewis, 235 S.W.3d 136, 145 (Tenn. 2007) (citing State v. Binion, 947 S.W.2d 867, 874 (Tenn. Crim. App. 1996); Neil P. Cohen et al., Tennessee Law of Evidence § 8.06[3][a], at 8-47). A "statement" may include non-verbal conduct which is intended as an assertion. Tenn. R. Evid. 801(a); State v. Thomas D. Stricklin, No. M2005-02911-CCA-R3-CD, 2007 WL 1028535, at 19-20 (Tenn. Crim. App., at Nashville, Apr. 5, 2007), perm. to appeal denied (Tenn. Aug. 20, 2007); see also State v. Burns, 29 S.W.3d 40, 47 (Tenn. Crim. App. 1999) (finding that the witness's testimony concerning the victim's negative reaction to hearing the defendant's name spoken was non-verbal conduct intended as an assertion offered to prove the defendant's identity).

Defendant argues that his verbal response was directed to Ms. Mansel's comment that the killing was execution-style, and that he did not have to be present to respond that the victim did not "feel anything" if the killing was indeed carried out in an execution-style manner as rumored. Furthermore, Defendant suggests that his lack of a response to Ms. Mansel's question was because Mr. Watson, whose brother was later indicted for the offense, said, "Drop it."

Defendant submits that the fact that he "kind of" grinned does not rise to the quantum level of proof necessary to corroborate in the offenses.

The interpretation of Defendant's verbal and non-verbal responses to Ms. Mansel's questions, however, is left for the jury's assessment of the weight and level of credibility assigned to the testimony. See Bigbee, 885 S.W.2d at 803 (observing that whether an accomplice's testimony has been sufficiently corroborated is generally a question for the jury). Based on our review of the record, we conclude that Ms. Mansel's testimony and the other evidence presented in this case is sufficient to establish the circumstances necessary to corroborate the accomplices' testimony. Defendant is not entitled to relief on this issue.

IV. Sufficiency of the Evidence

In reviewing Defendant's challenge to the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced on appeal with a presumption of guilt. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts

and drawn any reasonable inferences in favor of the State. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

First degree murder is "[a] premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1). As used in subdivision (a)(1), "premeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

The element of premeditation is a question of fact to be determined by the jury. State v. Davidson, 121 S.W.3d 600, 614 (Tenn. 2003). Although the jury may not engage in speculation, it may infer premeditation from the manner and circumstances of the killing. State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997); State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995). Our Supreme court has delineated several circumstances that may be indicative of premeditation, including the use of a deadly weapon upon an unarmed victim, the fact that the killing was particularly cruel, declarations of the intent to kill the victim by the defendant, the making of preparations before the killing for the purpose of concealing the crime, and calmness immediately after the killing. State v. Nichols, 24 S.W.3d 297, 302 (Tenn. 2000).

"The offense of conspiracy is committed if two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense." T.C.A. § 39-12-103(a) (2003). The offense of conspiracy is aimed at group criminality and is based upon the principle that group criminal activity poses a greater public threat than criminal offenses committed by a single individual. Id. at Sentencing Commission Comments. While the essence of the offense of conspiracy is an agreement to accomplish a criminal or unlawful act, the agreement need not be formal or expressed, and it may be proven by circumstantial evidence. State v. Shropshire, 874 S.W.2d 634, 641 (Tenn. Crim. App. 1993); State v. Hodgkinson, 778 S.W.2d 54, 58 (Tenn. Crim. App. 1989). "The unlawful confederation may be established by circumstantial evidence and the conduct of the parties in the execution of the criminal enterprise. Conspiracy implies concert of design and not participation in every detail of execution." Randolph v. State, 570 S.W.2d 869, 871 (Tenn. Crim. App. 1978). No person may be convicted of conspiracy to commit an offense unless an overt act in pursuance of such conspiracy is alleged and proven to have been committed by at least one member of the alleged conspiracy. T.C.A. § 39-12-103(d). As relevant in this case, first degree murder is a "premeditated and intentional killing of another." T.C.A. § 39-12-201(a)(1). Thus, in order for these convictions

to be supported, the State was required to prove that Defendant, Mr. Oakes, and Mr. Underwood entered into an agreement to commit the offense of premeditated murder.

Defendant argues that no rational trier of fact could find him guilty of the charged offenses based on the conflicting testimony presented by Mr. Oakes and Mr. Underwood. Defendant points out that the State itself expressed skepticism of these witnesses' credibility during closing argument as follows:

> We've presented you this case, and we have showed you what took place, but we're not so naive to believe that Noel Underwood and Hunter Oakes just wanted to scare an individual."
>
> Noel Underwood and Hunter Oakes are not going to tell you everything about their involvement in the case. They're not going to do that. For obvious reasons, they're not going to do that. And the core issues of their testimony are undisputed and corroborated.
>
> Who all was present? [Mr. Underwood and Mr. Oakes] are not going to tell you that. There are things such of that nature that we will never know. We're not going to know the full involvement of all parties. But what we do know is that [Defendant] pulled the trigger that night.
>
> I told you in my first closing that Noel and Hunter are going to try to distance themselves from the role that they played in it, and that is the inconsistencies in their statements.

Defendant contends that if the accomplices' disavowal of the existence of any conspiracy was not credible, then their testimony that he was the shooter was equally incredible.

We acknowledge the many inconsistencies in Mr. Oakes' and Mr. Underwood's description of the events occurring before, during, and after the killing. However, on appeal, all inconsistencies and conflicts in the testimony presented at trial are left to the jury for resolution. Viewing the evidence in a light most favorable to the State as to the murder conviction , Mr. Oakes, Mr. Underwood, and Defendant gathered at Mr. Oakes' house on the evening of July 18, 2004, to discuss "the situation" with the victim. Mr. Oakes called the victim's house to ascertain whether he was home. Although the victim did not answer his telephone, Mr. Oakes believed the victim may have been drinking and passed out. Before they left for the victim's house, Defendant put a "do-rag" over his hair, a long sleeve shirt, and surgical gloves. He then pulled on work gloves and duct taped the work gloves to the sleeves of his shirt. The three men drove to the victim's house, Defendant exited the car armed with a .44 magnum revolver, and walked toward the victim's house. When he returned in approximately twenty minutes, Defendant got into the car and said something to the effect that "it was done." The victim died as a result of a single gunshot wound to his head. After the killing,

the three men disposed of the murder weapon and any ammunition related to the revolver, and sold the Cadillac to a scrap dealer where it was subsequently crushed.

Based on the foregoing, we conclude that a rational trier of fact could find beyond a reasonable doubt that Defendant was guilty of the offense of first degree premeditated murder.

As to his conspiracy conviction, the State concedes that Mr. Oakes and Mr. Underwood testified that there was no plan to kill the victim, but argues that "it was clear from the evidence that there was such a plan." Mr. Oakes and Mr. Underwood testified that prior to the killing, animosity had arisen between the victim and Mr. Oakes and Defendant as a result of Mr. Oakes friendship with Ms. Reagan, and the men's belief that the victim was abusing both Ms. Reagan and her children. A few days before the victim's death, Mr. Oakes, Mr. Underwood and Defendant carried out a plan to scare the victim by driving by his house and discharging a weapon. Mr. Underwood testified that he, Mr. Oakes and Defendant left Mr. Ladd's residence with Defendant on July 18, 2004, after painting the Cadillac black, and returned to Mr. Oakes' house. While each witness's version of the immediate events prior to the killing differed in some respects, both men insisted that there was no plan to kill the victim and that Defendant acted unilaterally. However, both acknowledged that the three men discussed the "situation" concerning the victim that night. Mr. Underwood also testified in detail about the three men's activities prior to the killing. The three men drank Tequila as they discussed the situation concerning the victim. Mr. Oakes left the group to telephone the victim to ascertain if he was home and retrieved a gun from his bedroom. Mr. Underwood suggested that Defendant take a shower. Defendant put a do-rag over his head, put on a long-sleeved shirt, surgical gloves, and work gloves, and duct taped the work gloves to the sleeves of his shirt. The three men then drove to the victim's house.

The question of the accomplices' credibility was properly placed before the jury. By its verdict, the jury obviously found Mr. Underwood's and Mr. Oakes' denial of any conspiracy not credible in view of their testimony as a whole.

To reiterate, it is the jury's prerogative to accredit witness testimony and weigh the evidence. Based on our review of the record and the briefs of the parties, we conclude that a rational trier of fact could find beyond a reasonable doubt that Defendant was guilty of the offense of conspiracy to commit first degree premeditated murder. Defendant is not entitled to relief on this issue.

V. Prosecutorial Misconduct

Defendant raises numerous issues alleging prosecutorial misconduct during closing argument which he argues violates his constitutional due process rights. These incidents of misconduct include Defendant's contention that the prosecutor misstated the facts presented at trial, drew improper inferences, and asserted his personal opinion as to the credibility of the State's witnesses. Defendant also submits that the prosecutor's expressed skepticism of Mr. Oakes' and Mr. Underwood's credibility on certain issues supports a finding that the prosecutor knowingly used false and scripted testimony during trial.

The State argues, and we agree, that the issue of prosecutorial misconduct during closing argument is waived because Defendant did not contemporaneously object to any of the comments now challenged on appeal. See Tenn. R. App. P. 36(a). In the absence of plain error, the failure to make a contemporaneous objection constitutes a waiver of the issue. State v. Robinson, 971 S.W.2d 30, 42-43 (Tenn. Crim. App. 1997).

To recognize the existence of plain error, this court must find each of the following five factors applicable: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice. State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (adopting the factors first articulated in State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)); see also Tenn. R. Crim. P. 52(b). "All five factors must be established by the record before" an appellate court may "recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." Smith, 24 S.W.3d at 283.

Defense counsel candidly acknowledges in his reply brief that he did not contemporaneously object to the prosecutor's comments during closing argument as a result of tactical strategy. As Defense counsel noted in his brief, "realizing that the State had to convince the jury that its witnesses were lying in order to convict [on the conspiracy charge]," he "elected to rely on the jury to evaluate the proof" as to both charges. In his closing argument, defense counsel thoroughly and ably capitalized on the inconsistencies in the accomplices' testimony and the State's expression of skepticism as to the accomplices' disavowal of the existence of a conspiracy. Thus, having failed to establish at least one of the five review factors, Defendant is not entitled to relief on this issue.

VI. Failure to Disclose Terms of Plea Agreement

Relying on State v. Bolden, 979 S.W.2d 587 (Tenn. 1998), Defendant argues that the State's failure to disclose that Mr. Oakes had filed a motion requesting that he be granted judicial diversion in connection with his negotiated plea agreement violated his right to a fair trial and his due process rights.

"[A]ccomplice testimony is generally admissible even though it is the product of a plea agreement." Boxley, 76 S.W.3d at 390 (citing Bolden, 979 S.W.2d at 590). In order to meet the constitutional demands of a fair trial and due process, however, our supreme court has outlined the following requirements which must be met before the introduction of testimony procured through a plea agreement:

> (1) full disclosure of the terms of the agreements struck with the witnesses;
>
> (2) the opportunity for full cross-examination of those witnesses concerning the agreements and the effect of those agreements on the testimony of the witnesses; and

(3) instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of such witnesses who have been induced by agreements with the State to testify against the defendant.

Bolden, 979 S.W.2d at 590. "A violation of the Bolden requirements results in a violation of the constitutional right to due process." Boxley, 76 S.W.3d at 390 (citing Bolden, 979 S.W.2d at 590).

Before court was called into session at the beginning of the third day of trial, the State orally moved to sever co-defendant Oakes from the trial. The State announced that Mr. Oakes had agreed to enter a plea of guilty to the lesser included offense of solicitation of second degree murder, a Class C felony in exchange for his truthful testimony at trial. The State informed the trial court that the offense carried a "possible punishment of three to six years in the state penitentiary," and that Mr. Oakes would "take a sentencing hearing, at which there will be no promises or no guarantees as to what happens at the sentencing hearing." The prosecutor also said that "[t]he [S]tate is not going to take a position at the sentencing hearing. It will be something that the Court will decide."

After Mr. Oakes was sworn in as a witness, the following colloquy occurred during Mr. Oakes' direct examination:

STATE:	And you have agreed to testify here today based on a plea agreement, is that correct?
MR. OAKES:	Yes, sir.
STATE:	And you are to plead guilty to solicitation of second degree murder; is that correct?
MR. OAKES:	Yes, sir.
STATE:	And you will face a sentencing hearing; is that right?
MR. OAKES:	Yes, sir.
STATE:	And you face the possibility of three to six years in the state penitentiary; is that right?
MR. OAKES:	Yes, sir.

This colloquy did not inform the jury that the guilty plea submission form contained a notation that Mr. Oakes intended to request judicial diversion as an alternative form of sentencing, or that it was possible that Mr. Oakes might receive a probated sentence at the conclusion of the sentencing hearing. The jury was thus left with the impression that Mr. Oakes would spend some time in confinement for his role in the offenses.

At the beginning of Mr. Oakes' cross-examination, defense counsel questioned Mr. Oakes about his understanding of the process by which the trial court might sentence him to the maximum term, or six years, and Mr. Oakes acknowledged that his attorney had explained the process to him. At the conclusion of cross-examination, the following colloquy occurred:

DEFENSE COUNSEL: And isn't it true, that just like Mr. Underwood, in exchange for your truthful testimony, you've got a deal with the State where you could have a good chance to maybe get probation?

MR. OAKES: You heard what Your Honor [sic] read yesterday. I don't know what's going to happen.

Although defense counsel brought out the possibility of probation, he apparently was unaware of Mr. Oakes' request for judicial diversion, and therefore did not cross-examine Mr. Oakes about the possibility that his record might ultimately be expunged as a result of his agreeing to testify for the State. The record reflects that Mr. Oakes' guilty plea submission hearing was conducted after he testified.

The State argues that the request for judicial diversion was not part of Mr. Oakes' negotiated plea agreement. The State contends that as part of the negotiated terms, it only agreed to neither recommend nor challenge any statutorily possible sentencing alternatives.

The Bolden court, quoting the Iowa Supreme Court, explained the reasons behind requiring full disclosure as follows:

> In most instances, any potential for prejudice to a defendant's case will be avoided by allowing the witness to testify subject to searching cross-examination intended to develop fully any evidence of bias or motive on the part of the witness, or improper conduct on the part of the State. Every fact that might in some way influence the truthfulness and credibility of the witness's testimony should be laid before the jury. This ensures no unnecessary barriers will be imposed on the State's ability to bargain for truthful testimony, and at the same time ensures the jury will be able to determine what weight, if any, in light of all the evidence, to give the witness's testimony.

Bolden, 979 S.W.2d at 590 (quoting State v. McGonigle, 401 N.W.2d 39, 42 (Iowa 1987) (citation omitted)).

Certainly Mr. Oakes' request for judicial diversion, which the State agreed not to challenge, was an incentive for the entry of his plea of guilty to the lesser included offense of solicitation of second degree murder, and Mr. Oakes' credibility as a witness was very much at issue during the trial. However, the State disclosed the felony to which Mr. Oakes' was entering a plea of guilty, its classification, and the range of punishment. The State said that there were no guarantees as to Mr.

Oakes' sentence, and the determination of the length and manner of service of Mr. Oakes' sentence was left to the trial court's determination. The State further said that it was not going to take a position at the sentencing hearing, which implicitly included not opposing any request that might be made by Mr. Oakes or urging any sentencing determination that Mr. Oakes' did not want. Defendant, through counsel, was aware that the witness could ask for judicial diversion for the Class C felony to which he was entering a plea of guilty. Based on the foregoing, we find no violation of Defendant's constitution right to due process as articulated in Bolden. The State disclosed the terms of Mr. Oakes plea agreement, and Defendant was extended the opportunity for full cross-examination of Mr. Oakes' concerning his plea agreement. Defendant is not entitled to relief on this issue.

VII. Evidentiary Issues

Defendant challenges the trial court's evidentiary rulings concerning the admissibility of certain testimony from Juanita Stone, Nita Thacker, and Rick Berry. Defendant argues that the challenged testimony was either admissible under an exception to the rule against hearsay or that the trial court's rulings denied Defendant his constitutional right to present a defense as contemplated in State v. Brown, 29 S.W.3d 427 (Tenn. 2000).

We note initially that both before and during trial, various discussions were held concerning the admissibility of testimony from Juanita Stone and Nita Thacker about the victim's and Ms. Reagan's out-of-court statements, and that not all of these discussions were transcribed. In general, the trial court found that such hearsay statements did not fall into any of the exceptions from the hearsay rule, and that none of Ms. Reagan's out-of-court statements would be admissible unless she was first called as a witness at trial. Except for one of the victim's out-of-court statements to Ms. Stone as discussed below, Defendant did not seek admission of these statements under an exception to the rule against hearsay, but rather on the claim that the exclusion of the statements violated his constitutional right to present a defense.

Defendant submits for the first time in his brief, but without citation to authority, that "some, if not all" of the victim's statements to Ms. Stone reflected in the offer of proof were admissible as exceptions under the hearsay rule because they were either statements of the victim's then state of mind, excited utterances, or dying declarations. Although Defendant asserted this new ground for admission of the evidence in his motion for new trial, he did not address the issue during the motion hearing.

As this Court has explained:

> [i]n this jurisdiction, a party is bound by the ground asserted when making an objection. The party cannot assert a new or different theory to support the objection in the motion for a new trial or in the appellate court. . . . When, as here, a party abandons the ground asserted when the objection was made and asserts completely

> different grounds in the motion for a new trial and in this Court, the party waives the issue.

State v. Adkisson, 899 S.W.2d 626, 634-35 (Tenn. Crim. App. 1994) (footnotes and citations omitted). Thus, we conclude that Defendant has waived this issue regarding admissibility of the victim's statements to Ms. Stone based upon exceptions to the hearsay rule.

Waiver aside, however, we conclude that Defendant would not be entitled to relief on this issue. We observe initially that a hearsay statement is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). As a general rule, hearsay is not admissible at trial unless it falls under one of the exceptions to the rule against hearsay. Tenn. R. Evid. 802. "The determination of whether a statement is hearsay and whether it is admissible through an exception to the hearsay rule is left to the sound discretion of the trial court." State v. Stout, 46 S.W.3d 689, 697 (Tenn. 2001). As such, we will not reverse the trial court's ruling absent a showing that it abused its discretion. Id.

After Ms. Stone's cross-examination was concluded, Defendant made an offer of proof concerning other portions of Ms. Stone's conversation with the victim on July 18, 2004, which were ruled inadmissible by the trial court. Ms. Stone testified that the victim told Ms. Reagan earlier that day that he intended to have the children tested for drugs, that Ms. Reagan was very angry with the victim over this plan, that Ms. Reagan told the victim she would "blow his f—g head off," and that the victim was seeking ways to protect himself. Ms. Stone also acknowledged that the victim told her that he and Defendant had a verbal altercation on July 17, 2004, but that the issues were satisfactorily resolved. Ms. Stone said that the victim called Defendant "his bro." Defendant also submits that in Ms. Stone's written statement to the police was attached as an exhibit to a motion hearing conducted on July 12, 2006, Ms. Stone said that the victim told her at the end of their visit that he was "going home and wait for them to kill me." Defendant argues that these statements were admissible either to show the victim's state of mind, as excited utterances, or as a dying declaration.

A. Excited Utterance

In order for a statement to qualify for the excited utterance exception to the hearsay rule, a startling event or condition must be the catalyst for the excitement; there must be a nexus between the statement and the startling event; and, the utterance must be forthcoming while the declarant is under the stress of excitement from the event or condition. See State v. Gordon, 952 S.W.2d 817, 820 (Tenn. 1997). Although Ms. Stone described the victim as "scared" when he was at her house on July 18, 2004, there is nothing in the record to show that a startling event had occurred which prompted the victim's statements that evening. Based on our review of the record, we conclude that the victim's statements to Ms. Reagan do not qualify as excited utterances.

B. Dying Declaration

Rule 804(b)(2) of the Tennessee Rules of Evidence provides for the admission of a dying declaration as an exception to the hearsay rule as follows:

> Statement under belief of impending death. In a prosecution for homicide, a statement made by the victim while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death.

This Court has explained the dying declaration as follows:

> [t]he rationale for this hearsay exception is that one facing imminent death will be truthful for fear of "eternal consequences." Neil P. Cohen, et al., Tennessee Law of Evidence, § 804(b)(2.1) at 599 (3d ed. 1995). The awareness of impending death is deemed equivalent to the sanction of an oath. See Anthony v. State, 19 Tenn. 265, 278 (1838) (cited in Beard v. State, 485 S.W.2d 882, 885 (Tenn. Crim. App. 1972)); State v. Lunsford, 603 S.W.2d 745, 746-47 (Tenn. Crim. App. 1980). In Smith v. State, 28 Tenn. 9, 19 (1848) (citation omitted), our supreme court observed that when the declarant " 'is at the point of death, and when every hope of this world is gone, when every motive of falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth, a situation, so solemn and awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.'"

State v. Hampton, 24 S.W.3d 823, 828 (Tenn. Crim. App. 2000).

In Lunsford, this court observed that

> [t]he entire controversy revolves around whether the declarant had "a certain belief that rapid death was inevitable." This, the learned text writer teaches us, is the most essential element of the dying declaration exception to the hearsay rule. The requirement is one of hopelessness, and it must be met. Where the person is oblivious to the danger, or where he is merely aware of the possibility or even a probability, the requirement of hopelessness is not met.

Lunsford, 603 S.W.2d at 746.

Although Ms. Stone told the investigating officers that the victim said that he was "going home and wait for them to kill me," the victim also expressed a belief that "maybe [Defendant wa]s going to bring [his] kids [home] at 9:30." There is no indication that the victim believed that "rapid death was inevitable," and thus the statements sought to be introduced do not qualify for the dying declaration exception to the hearsay rule.

C. State of Mind

Tennessee Rule of Evidence 803(3) states in pertinent part: "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)" may be admitted as an exception to the hearsay rule. "However, 'only the declarant's conduct, not some third party's conduct, is provable by this hearsay exception.'" State v. Robinson, 239 S.W.3d 211, 223 -224 (Tenn. Crim. App. 2006) (quoting id., Advisory Comm'n Cmts.); State v.Leming, 3 S.W.3d 7, 18 (Tenn. Crim. App. 1998).

In the case sub judice, the victim's statements to Ms. Stone about the threats on his life qualify as hearsay to the extent that the statements were offered as evidence of Ms. Reagan's or Mr. Oakes' future conduct. See Robinson, 239 S.W.3d 224. The victim's statement that he was going home to "wait for them to kill" him does show the victim's state of mind at that time. However, even assuming that the victim's state of mind was relevant to a material issue at trial, it is evident that the true purpose of this statement was to provide evidence that a person other than Defendant murdered the victim, and thus was inadmissible hearsay. See State v. Farmer, 927 S.W.2d 582, 595 (Tenn. Crim. App. 1996) (concluding that statements "indicating the [murdered] victim's plan to steal marijuana with the [defendant] were inadmissible hearsay because they demonstrate not only the victim's state of mind, which was immaterial, but the [defendant]'s conduct as well).

D. Command

At trial, Ms. Stone testified that the victim thought of Defendant as a friend. Defense counsel then asked, "And isn't it true that [the victim] told you before he left that he did not – to not let Lisa [sic] Reagan get away with killing him?"

After sustaining the State's objection to this question, the trial court conducted a hearing out of the presence of the jury during which defense counsel argued that the statement was a command which was not offered for the truth of the matter asserted and therefore not hearsay. The trial court found that the statement was inadmissible hearsay and sustained the State's objection.

As Defendant submits, commands, instructions, and questions are often not hearsay because they are not offered to prove the truth of their content. State v. Lequire, 634 S.W.2d 608, 612 (Tenn. Crim. App. 1981); State v. Charles O. Emesibe, No. M2003-02983-CCA-R3-CD, 2005 WL 711898, *10 (Tenn. Crim. App., at Nashville, Mar. 28, 2005), perm. to appeal denied (Tenn. Oct. 17, 2005) (concluding that neighbor's statement that victim told her to call the police if she saw the defendant around her house was not offered for the truth of the matter asserted, and thus not hearsay). A command for the defendant to shoot the victim or a plea for the defendant not to harm the victim are clearly orders or commands not offered for the truth of the matter asserted. See State v. Derek T. Payne, No. W2001-00532-CCA-R3-CD, 2002 WL 31624813 (Tenn. Crim. App., at Jackson, Nov. 20, 2002), perm. to appeal denied (Tenn. May 19, 2003); State v. Reginald S. Mabone, No. 02C01-9203-CR-00054, 1993 WL 270618, at *1 (Tenn. Crim. App., at Jackson, July 21, 1993), perm. to appeal denied (Tenn. Oct. 4, 1993).

Based on our review of the record, we conclude that the victim's command to Ms. Stone not to let Ms. Reagan "get away" with killing him falls within this genre of non-hearsay orders or instructions. However, "[i]n most cases, if a statement is not offered for its truth, an issue of relevancy is prompted." State v. Schiefelbein, 230 S.W.3d 88, 128 (Tenn. Crim. App. 2007); see Tenn. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); id. at 402 ("Evidence which is not relevant is not admissible."). Defendant argues generally that the statement was relevant to his theory of defense that a third party was responsible for the victim's death. If so, then the statement becomes relevant only if offered for its truth, that is, that Ms. Reagan threatened to kill the victim. If this is Defendant's basis for offering the statement, then it is hearsay and inadmissible. Based on our review, we conclude that this statement had little, if any, probative value other than to show the victim's mistrust of Ms. Reagan following their separation at the time he made the command. The jury was informed of the stressed relationship between the victim and Ms. Reagan. Defense counsel brought out that the victim was upset with Ms. Reagan for taking the children with her. Based on our review of the record, we conclude that any error in excluding the statement was harmless.

VIII. Right to Present a Defense

In addition to Ms. Stone's offer of proof, in a separate offer of proof, Nita Thacker stated that she knew both the victim and Ms. Reagan. Ms. Thacker testified that Ms. Reagan came to her house prior to the victim's death, pulled a gun out of her purse, and said "that was what she was going to kill the victim with."

Defendant also submits that he was prepared to call Investigator Dan Friels and Terry Scarbrough, the victim's brother, as witnesses in order to question them about various statements Ms. Reagan made after the killing. Defendant did not make an offer of proof at trial as to the proposed testimony of these witnesses, but he attached affidavits from each witness to his motion for new trial. Defendant contends that he did not call these witnesses because of the trial court's general ruling that Ms. Reagan's statements to third parties would be excluded unless she was called as a witness by the defense. Defendant also argues that the trial court erred in not allowing him to cross-examine Agent Callahan at trial about Ms. Reagan's statements during her police interviews.

Defendant argues that these statements were critical to his theory of defense because they identified recent threats to the victim, identified another party who had a motive to kill the victim, tended to negate Defendant's alleged motive for the killing, and set a time frame within which the third party needed to act, that is, before the anticipated meeting with DCS on Tuesday, July 20.

In State v. Brown, our supreme court recognized that "[t]he Sixth Amendment and the Due Process Clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense which includes the right to present witnesses favorable to the defense." Brown, 29 S.W.3d at 432 (citations omitted); Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973). In certain situations, "[t]he constitutional right to present a defense has been held to

'trump' the rule against hearsay." Brown, 29 S.W.3d at 432 (citations omitted); see also State v. Flood, 219 S.W.3d 307, 316-17 (Tenn. 2007); State v. Rice, 184 S.W.3d 646, 673 (Tenn. 2006).

This right is not absolute, however, and where appropriate "must yield to other legitimate interests in the criminal trial process." Chambers, 410 U.S. at 295, 93 S. Ct. at 1046. "The facts of each case must be considered carefully to determine whether the constitutional right to present a defense has been violated by the exclusion of evidence." Brown, 29 S.W.3d at 433. In determining whether a defendant's constitutional right to present a defense has been violated by the exclusion of evidence, a reviewing court should consider whether: "(1) the excluded evidence is critical to the defense; (2) the evidence bears sufficient indicia of reliability; and (3) the interest supporting exclusion of the evidence is substantially important." Id. (citing Chambers, 410 U.S. at 298-301, 93 S. Ct. at 1047-49).

Defendant argues that the excluded testimony was critical to his theory of defense that Mr. Oakes and Ms. Reagan killed the victim. Defendant points out that the record shows that Mr. Oakes taught Ms. Reagan how to shoot the .44 magnum revolver, that he and Ms. Reagan left Mr. Ladd's residence at approximately 2:00 a.m. on July 19, 2004, and that the victim's neighbor heard gunshots around that time frame coming from the victim's house. Defendant submits that the excluded testimony would have revealed that Ms. Reagan had recently threatened to kill the victim by shooting him in the head, that the victim's death occurred in the manner threatened, and that Ms. Reagan was angry with the victim over his intention to seek the assistance of the Department of Children's Services in regaining custody of his children.

The trial court found that the excluded testimony was not critical to Defendant's defense in that the statements did not specifically point to the guilt of a third party. The trial court also questioned the reliability of the out-of-court statements.

Evidence that another person had the motive and opportunity to commit the offense for which a defendant was charged would certainly be relevant if its probative value is not substantially outweighed by the risk of unfair prejudice, confusion of issues, possible misleading of the jury, or a waste of time. State v. Powers, 101 S.W.3d 383, 395 (Tenn. 2003). Nor is the defendant required to prove, as the trial court appears to have suggested in the instant case, that the proffered evidence directly connects the third party with the crime and clearly identifies someone other than the accused in order to be admissible. Id. at 397. Arguably, the excluded testimony in the case sub judice would have assisted Defendant in demonstrating that Ms. Reagan had a motive to kill the victim.

We thus turn to an analysis of the indicia of reliability surrounding the statements. In Chambers, the defendant called Gable McDonald as a witness because Mr. McDonald had confessed on three separate occasions that he had committed the crime for which the defendant was now on trial. The trial court, however, limited the defendant's examination of Mr. McDonald under the common law rule that a party may not impeach his own witness. Chambers, 410 U.S. at 295. The trial court also excluded as hearsay the testimony of the three witnesses to whom Mr. McDonald had confessed. Id. at 298. The Supreme Court found that the hearsay statements of these witnesses were

made under "circumstances that provided considerable assurance of their reliability" as evidenced by the following:

> First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case – McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest. McDonald stood to benefit nothing by disclosing his role in the shooting to any of his three friends and he must have been aware of the possibility that disclosure would lead to criminal prosecution. Indeed, after telling Turner of his involvement, he subsequently urged Turner not to 'mess him up.' Finally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury.

Id. at 300 (internal citations omitted).

In Brown, the trial court excluded the defendant's attempt to present the testimony of two friends of the victim who were prepared to testify that the victim had confided in them that she had engaged in sexual intercourse with an adolescent male during the same time period that the defendant allegedly raped her. The supreme court found that although the proffered testimony was at least initially appropriate under Rule 412 of the Tennessee Rules of Evidence, the evidence was ultimately inadmissible as hearsay. Brown, 29 S.W.3d at 431-32. In determining whether the exclusion of the evidence, notwithstanding its hearsay implications, violated the defendant's right to present a defense, the court found that the evidence was relevant to rebut the State's medical proof, and that the proffered testimony had the indicia of reliability. Id. at 434-35.

In making its reliability assessment, the supreme court noted that both witnesses were friends of the victim, that they had no animosity toward the defendant or any other motive to fabricate the statement, and that the hearsay proof was corroborated by the non-hearsay proof that the two witnesses had personally observed intimate contacts between the victim and the adolescent male. Id. The court also observed that, like the situation in Chambers, the declarant of the out-of-court statements was present in the courtroom. Id. at 435, n.15.

The case sub judice is clearly distinguishable from both Chambers and Brown because neither the victim nor Ms. Reagan were present in the courtroom. Moreover, Ms. Reagan's statements as told to the victim as told to Ms. Stone are classic double hearsay, that is, "he said she said." See Tenn. R. Evid. 805 ("Hearsay within hearsay is excluded unless each of the statements

falls within an exception to the hearsay rule."). Although there was a confidential and familial relationship between Ms. Stone and the victim to lend some indicia of reliability to the victim's own out-of-court statements to her, see Flood, 219 S.W.3d at 318 (finding that minor victim's statements to her father had some indicia of reliability), this indicia of reliability is greatly diminished when considering the victim's rendition of Ms. Reagan's out-of-court statements as relayed by Ms. Stone. Also troubling is the lack of any evidence at trial which would tend to support the content of Ms. Reagan's and the victim's verbal altercation as described by Ms. Stone. Thus, the situation in the case sub judice falls short of the basis for finding an indicia of reliability in Chambers or Brown. That is, neither declarant was present at trial, and there was no other evidence presented to support the threats attributed to Ms. Reagan.

Moreover, the United States Supreme Court described the interest behind the hearsay rule in Chambers:

> The hearsay rule, which long has been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of the statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

410 U.S. at 298, 93 S. Ct. at 1047. Rule 802 thus serves an important interest in excluding testimony that is untrustworthy. Flood, 219 S.W.3d at 319.

Based on a careful review of the record, we conclude that the trial court did not err by excluding the victim's and Ms. Reagan's out-of court statements, and that the exclusion did not prevent Defendant from presenting a defense.

As for Ms. Thacker's proposed testimony that Ms. Reagan told her that she, Ms. Reagan, would shoot the victim with her gun, Defendant did not provide any of the circumstances under which this statement was made or any time frame for the statement other than it occurred some time prior to the killings. Based on our review of the evidence presented, we cannot conclude that this hearsay statement contains a sufficient indicia of reliability to support its admissibility under the principles set forth in Chambers or Brown.

Defendant also argues that he should have been able to present testimony through Investigator Friel and Agent Callahan about Ms. Reagan's statements to the police during their investigation of the offense. Defendant attached affidavits from both officers memorializing their interviews with Ms. Reagan as an exhibit to his motion for new trial during which Ms. Reagan made various statements, according to the officers, such as: "Lesa also said that several years ago that she did make the statement that she would like to kill [the victim];" "She said that [the victim] didn't deserve to die that way, that he deserved to die, but he didn't deserve what he got;" "Lesa said that

if she was going to kill [the victim] it would have been a long time ago;" and "Lesa said she did go to Nita Thacker's with a gun and told her she (Lesa) wasn't going to be beaten anymore."

The State informed the trial court prior to trial that Ms. Reagan was still under investigation for her role in the killing, and that it did not intend to call her as a witness. While it is possible that she would have invoked her privilege against self-incrimination, there is no indication that defense counsel tried to determine prior to trial whether Ms. Reagan would have agreed to testify. Nor did Defendant seek to have Ms. Reagan declared an "unavailable witness" by subpoenaing her for trial. See Tenn. R. Evid. 804(a)(1) (providing that a witness may be declared unavailable if he or she invokes the privilege against self-incrimination when called to testify); State v. Zirkle, 910 S.W.2d 874, 891 (Tenn. Crim. App. 1995). Rule 804(b)(3) provides that an unavailable witness's statement is admissible if:

> at the time of its making [the statement was] so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Nonetheless, when reading Investigator Friel's and Agent Callahan's written notes of Ms. Reagan's interviews, it does not appear that her self-serving statements, when taken in context, qualify as statements against interest under Rule 804(b)(3). The fact that she admitted making threats against the victim in the past does not implicate her in the killing nor does it exculpate Defendant. Ms. Reagan, despite her relationship with the victim, implicated both Defendant and Mr. Oakes in the commission of the offense during her interviews. Moreover, Ms. Reagan consistently said that her meeting with the victim the morning before he was killed was amicable, and that they discussed reconciliation. To allow selective out-of-court statements to be introduced would mislead or confuse the jury. The trial court did not err in ruling these statements inadmissible, nor do we conclude that Defendant's right to present a defense was hindered by the trial court's exclusion of Ms. Reagan's out-of-court statements.

Defendant argues that the trial court erred in not allowing him to introduce a videotape prepared by Mr. Berry portraying his reconstruction of an attempt on the evening of July 19, 2006, to walk up the hill to the victim's house. On direct examination, Mr. Berry described the reconstruction and testified that the area was "pitch black" without a moon, and that he could not see his "hand in front of [his] face." Defendant did not offer the video tape of the reconstruction into evidence as an exhibit. Defendant did make an offer of proof after the close of his defense concerning what was reflected on the videotape, but the record does not indicate that Defendant made a specific request that the videotape be introduced as an exhibit, nor does the record reflect that the trial court made any ruling on the issue. Defendant concedes in his reply brief that the trial court did not make a ruling on the record but suggests that the fact that he made an offer of proof on the issue indicates that the trial court had made known at some point that the videotape would not be admissible.

We acknowledge that the record indicates that a number of conferences between the parties and the trial court were not transcribed. However, the party seeking appellate review has the duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal. State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983). Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). Absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue. See Tenn. R. App. P. 24(b). Defendant is not entitled to relief on this issue.

IX. Admission by a Party Opponent

Defendant argues that the trial court erred in allowing Ms. Mansel to testify about her encounter with him at a gathering after the killing. During this event, Ms. Mansel asked the group in general if they had "heard about the murder across the mountain," and Ms. Mansel commented that she "heard it was execution style." According to Ms. Mansel, Defendant responded, "He didn't feel a damn thing." Ms. Mansel asked Defendant, "Damn, did you do it." Ms. Mansel stated that Lynn Watson said at that point, "Drop it." Defense counsel objected to the statement as hearsay, and his objection was sustained by the trial court. Ms. Mansel then testified as follows:

MS. MANSEL:	He – he didn't respond, [Defendant] didn't respond. He kind of grinned and –
THE STATE:	What was the look on his face?
MS. MANSEL:	Kind of a grin, you know. Very – pretty much cold.
THE STATE:	Pretty cold? You felt it was pretty cold the way that . . .
MS. MANSEL:	Yeah.

Relying on Hulsey v. Bush, 839 S.W.2d 411 (Tenn. App. 1992), Defendant argues that the intent which could be inferred from both his verbal and nonverbal response to Ms. Mansel's dialog was so speculative that any probative value of the response was substantially outweighed by the risk of unfair prejudice.

In Hulsey, a deed dispute, the defendant sought to introduce into evidence a conversation between one of the co-defendants, J. L. Bush, and the deceased grantor, Ned Parker, during which "1) J. L. Bush made a statement to Ned Parker that he, Bush, was going to build a garage on the property and after he built the garage, the property would be his and 2) that in response to this statement by J.L. Bush, Ned Parker made no verbal response, but simply turned and walked away." Hulsey, 839 S.W.2d at 413. The trial court found that Mr. Parker's nonverbal conduct was inadmissible hearsay offered to prove that Mr. Parker had consented to the co-defendant's presence

on his land. Id. The court of appeals agreed with the trial court's assessment but observed that even if the trial court's ruling was in error, such error was harmless. The act of turning and walking away would require the jury to speculate as to Mr. Parker's intent, and there was nothing in the record which would shed light on his intention. Thus, the court found that "[w]hatever probative value this evidence may have, it is substantially outweighed by dangers of unfair prejudice." Id.

Mr. Parker was not a party opponent to the dispute reviewed in Hulsey, nor did the nonverbal response fall into any of the other recognized exceptions to the rule against hearsay. In the case sub judice, however, the State presented Ms. Mansel's testimony under the exception extended to admissions by a party opponent. This exception to the hearsay rule provides for the admission of "[a] statement offered against a party that is . . . the party's own statement in either an individual or a representative capacity...." Tenn. R. Evid. 803(1.2).

Exceptions to the hearsay rule have been carved out for hearsay statements that "bear sufficient indicia of reliability and trustworthiness to warrant admission." State v. Henry, 33 S.W.3d 797, 802 (Tenn. 2000). Our courts have recognized that:

> when a statement is made in the presence and hearing of one accused of an offense and the statement tends to incriminate him, or is of an incriminating character, and such statement is not denied or in any way objected to by him, both the statement and the fact of his failure to deny it or make any response to it, is admissible against him as evidence of his acquiescence in its truth.

Ledune v. State, 589 S.W.2d 936, 939 (Tenn. Crim. App. 1979). Before a tacit admission may be used as evidence against a party, however, several requirements must be met. "First, the party against whom it is used must have heard and understood the other person's statement." Neil P. Cohen, et al., Tennessee Law of Evidence, § 8.06[4][d], at 8-44 (4th ed. 2000). After satisfying that requirement, it must next be established that the subject matter of the accusation must be within the knowledge of the party. Id. Additionally, "the party must have been physically able to communicate a clarification or disagreement." Id. As a final requirement, "the circumstances must have been such that the party would probably have responded if he or she disagreed with the statement." Id. An example of a tacit admission is "silence in the face of a damning accusation." Id.

Defendant's out-of-court statements, both verbal and nonverbal, are subject, of course, to Tennessee Rules of Evidence 401 and 403. Relevant evidence may be excluded at trial if the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Tenn. R. Evid. 403. The determination of relevancy is left to the discretion of the trial court, and this Court will not overturn a trial court's determination in this regard in the absence of an abuse of discretion. State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995).

Defendant first contends that Ms. Mansel did not make an accusation or a statement but rather simply asked a question. However, it is plain from the context within which the question was

posed that it was accusatory and specific in nature. Defendant also contends that his responses to Ms. Mansel's dialog were so ambiguous that the jury was invited to speculate as to his intent, and, therefore, any probative value of the testimony was substantially outweighing by its prejudicial effect.

The record established that Ms. Mansel's statement identified Defendant as the target of an accusation, that Defendant knew what the accusation was in reference to, that the accusation was of an incriminating character, and Defendant did not deny or object to the accusation. See State v. Black, 815 S.W.2d 166, 177 (Tenn. 1991). The fact that Defendant did not respond verbally to Ms. Mansel could be construed as a reaction to Mr. Watson's command "to drop it," rather than Ms. Mansel's question, goes to the weight attributed to the admission, and the trier of fact was free to give as much or as little weight to the evidence as deemed appropriate. Based on our review, we conclude that the trial court did not abuse its discretion in admitting the challenged testimony. Defendant is not entitled to relief on this issue.

X. Motion for a Continuance

Defendant argues that the trial court erred in not granting his motion for a continuance after Mr. Oakes entered a plea of guilty prior to the commencement of the third day of trial. Defendant initially asked for a mistrial which was denied by the trial court. The following colloquy then occurred:

THE COURT:	So I would anticipate going ahead and hearing from those witnesses, and I would not expect [defense counsel] on behalf of [Defendant] to immediately start cross-examining Mr. Oakes after he has testified. Maybe we'll take a recess for awhile, and possibly an overnight recess to allow you additional time to . . .
DEFENSE COUNSEL:	And, respectfully, Your Honor, if this is the way we're going to go, I'd at least have a – I would like to at least have until tomorrow morning to prepare how I'm going to deal with it. In all fairness, it's a serious case, we're at 10:20 now, we're asking for a few hours and tonight to contemplate it and see where we can go in the morning. And I think that we'll finish tomorrow.
THE COURT:	I guess I'm not opposed to that, but I'm not granting that at this time. I understand what you're saying. I do wish to proceed on with the witnesses today. I think it would be appropriate to go ahead and get the witnesses on, and you have time to prepare for cross,

as opposed to preparing for the direct, because there's nothing you can do about that. That's coming in . . .

DEFENSE COUNSEL: That's what I'm saying. Do that witness, put Mr. Oakes on, that will conclude the State's proof. I'll have a cross-examination, I know they have the right to redirect, and we could start with that in the morning and see if we can't complete this trial tomorrow if we're going to have to go forward with it.

THE COURT: Well, I'm looking favorably at that idea.

DEFENSE COUNSEL: Thank you, Your Honor.

At the conclusion of Mr. Oakes' direct examination, defense counsel renewed his motion for a continuance. A conference was conducted out of the presence of the jury but not transcribed for the record. The jury was returned to the courtroom at the conclusion of the conference, and the trial court, after apparently granting Defendant's request for an overnight continuance, adjourned court.

The decision of whether to grant a continuance is one within the sound discretion of the trial court, which will not be overturned absent a clear showing of abuse of discretion which resulted in prejudice to the defendant. State v. Melson, 638 S.W.2d 342, 359 (Tenn. 1982); State v. Russell, 10 S.W.3d 270, 275 (Tenn. Crim. App. 1999). "In order to establish an abuse of discretion, the complaining party must make a clear showing of prejudice as a result of the continuance being denied." Russell, 10 S.W.3d at 275 (citing State v. Teel, 793 S.W.2d 236, 245 (Tenn. 1990)).

In his brief, Defendant lists several statements made by Mr. Oakes which were inconsistent with Mr. Underwood's testimony. Defendant argues that the trial court's failure to grant him a longer continuance prevented him from being able to effectively investigate and challenge these statements during cross-examination.

Defense counsel expressed his agreement with the trial court's grant of an early adjournment on the third day of trial so that he could prepare for Mr. Oakes' cross-examination. Defense counsel did not renew his motion for a continuance the following morning. Instead, defense counsel indicated that he was ready to proceed, and thereafter subjected Mr. Oakes to a thorough and lengthy cross-examination. After a review of the record, we conclude that Defendant has not demonstrated any prejudice resulting from the length of the continuance granted by the trial court. Defendant is not entitled to relief on this issue.

XI. Election of Facts

Defendant argues that the inconsistencies between Mr. Oakes' and Mr. Underwood's testimony were so numerous that the State in essence presented two separate theories to the jury in

support of his convictions. As a result, Defendant contends that the State should have been required to elect either Mr. Oakes' version of the events leading up to the victim's death, or Mr. Underwood's version.

Defendant finds support for his argument in the concept of "prosecutorial inconsistency," which, as recognized in some jurisdictions, holds that a prosecutor's use of "inherently factually contradictory theories violates the principles of due process" when presented in the separate trials of separate defendants. Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000); but see State v. Housler, 193 S.W.3d 476, 492 (Tenn. 2006) (expressly declining to address the concept espoused in Groose because the facts presented did not support a finding that the prosecutor pursued inconsistent theories in trying separate defendants in separate trials).

Nonetheless, the situation presented in the case sub judice is not analogous to that examined in Groose, that is, inconsistent theories in separate trials. In the present case, we are presented with testimony from two witnesses in the same trial, which, at times, was obviously inconsistent. Thus, we find Defendant's reliance on the concept of "prosecutorial inconsistency" misplaced.

Nor are we persuaded by Defendant's argument that the inconsistent testimony required the State to elect which witness's version of the sequence of events it intended to rely on to support a conviction. The State argues in its brief that Defendant did not request an election of offenses at trial, and the issue is thus waived. We agree that a defendant's failure to raise certain issues at trial may forfeit review of those issues on appeal. However, a request for an election of offenses was not required under the circumstances presented in this case.

The concept of "election of offenses" arises when the State presents evidence of multiple crimes committed by the defendant against the victim, but the defendant is charged with the commission of only one offense. In that situation, "the prosecution must elect the particular offense as charged in the indictment for which the conviction is sought." State v. Brown, 992 S.W.2d 389, 391 (Tenn. 1999) (citations omitted). As the Brown court explained:

> [t]he requirement of election serves numerous interests: it enables the defendant to prepare for the specific charge; it protects a defendant against double jeopardy; it enables the trial judge to review the weight of the evidence in its role as thirteenth juror; and it enables an appellate court to review the legal sufficiency of the evidence. The most important interest served by election, however, is to ensure that the jurors deliberate over and render a verdict based on the same offense . . . .

Id. (internal citations omitted).

In the case sub judice, Defendant was charged with one count of first degree premeditated murder and one count of conspiracy to commit first degree premeditated murder. The State did not present any evidence of any other uncharged offenses.

As this Court has previously observed, "although inconsistencies or inaccuracies may make the witness a less credible witness, the jury's verdict will not be disturbed unless the inaccuracies or inconsistencies are so improbable or unsatisfactory as to create a reasonable doubt of the appellant's guilt." State v. Radley, 29 S.W.3d 532, 537 (Tenn. Crim. App. 1999). We acknowledge that there were numerous inconsistencies in Mr. Oakes' and Mr. Underwood's testimony concerning the painting of the Cadillac, who was driving when, what Defendant was wearing on the night of the killing, and other such details. If anything, however, these inconsistencies helped the defense discredit their testimony, and defense counsel took full advantage of these inconsistencies in his cross-examination of the witnesses and during closing argument.

Nonetheless, both men testified that Defendant got out of the vehicle near the victim's home armed with a gun, that he disappeared in the direction of the victim's home, and that he reappeared a short time later informing the witnesses that "it had been done." We reiterate that the resolution of inconsistent testimony is the province of the jury, and, by its verdict, the jury obviously resolved any inconsistencies in favor of the State. See State v. Jessie Levent Tharpe, No. W2005-00224-CCA-R3-CD, 2005 WL 2007160, *2 (Tenn. Crim. App., at Jackson, Aug. 22, 2005), perm. to appeal denied (Tenn. Dec. 19, 2005) (observing that "our examination in a sufficiency review is not to revisit inconsistent, contradicting, implausible, or non-credible proof, as these issues are resolved solely by the jury). Based on the foregoing, we conclude that an election of offenses was not required in this case, and Defendant is not entitled to relief on this issue.

XII. Variance

Defendant argues that there was a material and prejudicial variance between the bill of particulars and the evidence presented at trial. Defendant submits that the bill stated that "Mitchell Hunter Oakes did accompany and aid [Defendant] in his actions." Further, the State submitted in support of the conspiracy charge that:

> [Defendant] and Mitchell Hunter Oakes participated in a plan to unlawfully and knowingly kill Donald Stone. Mitchell Hunter Oakes provided the gun to [Defendant] and accompanied him and Noel Underwood to the residence of Donald Stone on the above date and time where Donald Stone was shot and killed.

Defendant contends that Mr. Oakes testified at trial that he did not engage in a plan with Defendant to kill the victim, that he had sold Defendant the murder weapon prior to the event, and that he did not accompany Defendant into the victim's home or aid Defendant in the killing. Defendant argues that he was prepared to defend the presence of a conspiracy based on the bill of particulars, and that Mr. Oakes' denial that certain facts specified in the bill of particulars occurred, particularly the existence of a conspiracy, was a prejudicial surprise at trial. It appears that it is Defendant's contention that because Mr. Oakes' testimony was bargained for by the State, the State essentially adopted Mr. Oakes' version of the incident.

The State initially argues that Defendant has waived this issue because it was not included in his motion for new trial. As Defendant points out, however, the issue was raised in his motion for acquittal which incorporated his motion for new trial, and the trial court heard argument on the issue prior to trial. Thus, we will consider Defendant's issue on the merits.

"The purpose of the bill of particulars is to provide information about the details of the charge when necessary for a defendant to prepare his or her defense, to avoid prejudicial surprise at trial, and to enable the defendant to preserve a plea of double jeopardy." State v. Speck, 944 S.W.2d 598, 600 (Tenn. 1997). "Information that may be required in the bill of particulars includes, but is not limited to, details as to the nature, date, or location of the offense." Id. It is not meant, however, to be used for the purposes of broad discovery. See Tenn. R. Crim. P. 7(c), Advisory Commission Comments.

A variance between an indictment or a subsequent bill of particulars and the evidence presented at trial is not fatal unless it is both material and prejudicial. State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984); State v. Ealey, 959 S.W.2d 605, 609 (Tenn. Crim. App. 1997). The variance is not to be regarded as material when the indictment and proof substantially correspond. State v. Mayes, 854 S.W.2d 638, 640 (Tenn. 1993) (citations omitted). A material variance occurs only if the prosecutor has attempted to rely upon theories and evidence at the trial that were not fairly embraced in the allegations made in the charging instrument. Id.; Ealey, 959 S.W.2d at 609.

In the present case, although Mr. Oakes' and Mr. Underwood's testimony was sometimes inconsistent and despite the fact both disavowed the presence of a conspiracy, the State did not abandon the theories reflected in the bill of particulars, and the State presented other evidence consistent with its theories. Based on our review, we conclude that Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgments of the trial court.

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THOMAS T. WOODALL, JUDGE